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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

RANCE DUYAN et al.,

Plaintiffs and Appellants,

v.

PAUL BUCKLEY,

Defendant and Respondent.

D054576

(Super. Ct. No. 37-2008-00091245-  
CU-BT-CTL)

APPEAL from an order of the Superior Court of San Diego County, Yuri Hoffman, Judge. Reversed.

I

INTRODUCTION

Plaintiffs Rance Duyan and Adam Hutchins (Plaintiffs) appeal from an order of the trial court granting defendant Paul Buckley's motion to strike under the anti-SLAPP (strategic lawsuit against public participation) law<sup>1</sup>. Plaintiffs filed this action against

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<sup>1</sup> California Code of Civil Procedure section 425.16. Further statutory references are to the Code of Civil Procedure unless otherwise indicated.

Buckley and two other defendants in relation to conduct on the part of the defendants with respect to a failed downtown health club called Bodyworks. Plaintiffs were minority owners of the company that operated Bodyworks. The majority owner retained Buckley to represent the company in an unlawful detainer action against it by its landlord.

In the complaint, Plaintiffs allege three causes of action against Buckley—conflict of interest, legal malpractice, and aiding and abetting a breach of fiduciary duty. Plaintiffs allege that Buckley helped the majority owner enter into a secret agreement with another fitness center to sell Bodyworks' customer lists and goodwill to that fitness center. According to Plaintiffs, the majority owner personally benefitted by selling the customer list. Plaintiffs allege that in assisting the majority owner, Buckley failed to protect Plaintiffs' interests.

Buckley moved to strike the three causes of action against him under the anti-SLAPP statute, arguing that all of Plaintiffs' claims arose from protected activity. Specifically, Buckley maintained that the claims were based on Buckley's conduct in defending the company in the unlawful detainer action. The trial court granted Buckley's motion to strike and dismissed the complaint.

On appeal, Plaintiffs contend that the trial court erred in concluding that their causes of action against Buckley arise from protected activity. Plaintiffs maintain that they are suing Buckley for conduct unrelated to his representation of the company in the unlawful detainer action, and that the causes of action against Buckley do not arise from protected activity. We conclude that the trial court erred in determining that the

challenged causes of action arise from protected activity. We therefore reverse the order granting Buckley's motion to strike under the anti-SLAPP statute.

## II

### FACTUAL AND PROCEDURAL BACKGROUND<sup>2</sup>

Madhouse LLC (Madhouse) owned and operated a health club in downtown San Diego called Bodyworks. One of the defendants in this case, Madeline Saia, was the majority owner of Madhouse, and owned a 71 percent interest in the business. Duyan owned a 20 percent interest, and Hutchins owned a 9 percent interest.

In or around the summer of 2008, Madhouse became insolvent. Bodyworks was closed on August 1, 2008. In late July 2008, Madhouse's landlord at the Bodyworks location, Was Fun Realty, Inc. dba Hughes Management, initiated an unlawful detainer action against Madhouse.<sup>3</sup> On July 29, Saia retained Buckley to represent Madhouse in that unlawful detainer action.

According to Plaintiffs' complaint, in July 2008, Saia "began selling the customer list and customer goodwill to a competing gym, Pure Fitness . . . ." Plaintiffs allege that Saia encouraged Bodyworks customers to become members of Pure Fitness, and that under this arrangement, Saia personally benefitted while Madhouse and Plaintiffs

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<sup>2</sup> We take the factual background of this case from the allegations of the plaintiffs' complaint, as well as from declarations of the parties, where relevant.

<sup>3</sup> The record in this case does not include a copy of the complaint filed in the unlawful detainer action, so this court is not aware of the exact date on which it was filed. However, a number of other documents that refer to the unlawful detainer action and to Madhouse's response to the action indicate that the unlawful detainer action was filed near the end of July 2008.

received nothing. Plaintiffs allege that although Buckley had been retained to represent Madhouse, at some point he "changed allegiance and represented Saia personally in the transaction with Pure [Fitness] and failed to represent or protect the interests of either the company or the Plaintiffs."

On September 8, 2008, Plaintiffs filed a complaint against Saia, Buckley, and Mitch Arrington, a "dealer/broker of fitness equipment located in Santa Ana, California."<sup>4</sup> The complaint asserts seven causes of action, only three of which involve Buckley and are relevant to this appeal. In count 4, entitled "Conflict of Interest," Plaintiffs allege the following: "Defendant Buckley was retained as the Company attorney. On or before July[] 2008[,] Buckley represented Saia without disclosure to or consent from the Plaintiffs, the minority members, in violation of the Rules of Professional Conduct."

In count 5, entitled "Legal Malpractice," Plaintiffs allege: "Defendant Buckley failed to represent the Company and/or its members in accordance with the reasonable attorney standard[.] [¶] . . . A reasonable attorney would not have represented Defendant Saia with regard to her relationship and dealings with Pure [Fitness], when such relationship and dealings presented a conflict of interest between Defendant Saia and the company and/or the Plaintiffs, the minority Members." In count 6, entitled "Aiding and abetting breach of fiduciary duty," Plaintiffs allege that Buckley "aided and abetted Saia

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<sup>4</sup> Plaintiffs allege that Saia sold Madhouse's fitness equipment to Arrington for less than half of its value.

in her dealings with Pure [Fitness] involving the misappropriation of customer lists and goodwill without the consent of the Plaintiffs."

On October 7, 2008, Buckley filed his anti-SLAPP motion.<sup>5</sup> Plaintiffs filed their opposition to Buckley's anti-SLAPP motion on December 1. The trial court heard oral argument from the parties' attorneys and granted Buckley's anti-SLAPP motion on December 12. In its ruling, the trial court stated in pertinent part:

"Here, Defendants seek to strike Plaintiffs' fourth (conflict of interest), fifth (legal malpractice), and sixth (aiding and abetting breach of fiduciary duty) causes of action. While Plaintiffs allege this action is independent of any underlying action between the parties, ¶¶ 29-30 of the fourth cause of action of the Complaint allege: 'Defendant Buckley was retained as the Company attorney. On or before July, 2008 Buckley represented Saia without disclosure to or consent from the Plaintiffs, the minority members, in violation of the Rules of Professional Conduct. [¶] As a result, Plaintiffs have been damaged.' The fifth and sixth causes of action rely upon these allegations. The crux of Plaintiffs' action, therefore, is Buckley's alleged representation of Saia in the underlying unlawful detainer action (37-2008-00089200-CU-PO-CTL – *Was Fun Realty, dba Hughes Management v. Madhouse, LLC dba Bodyworks*). An anti-SLAPP motion is appropriate to strike lawsuits that seek to penalize earlier litigation and there is no requirement that the matter be of public interest. [Citations.] The Court was persuaded by each of the arguments presented by Defendants and finds that Defendants have met their burden as the moving party under CCP § 425.16."

On February 5, 2009, Plaintiffs filed a timely notice of appeal.

On August 25, 2009, after Buckley filed his Respondent's Brief in this court, Plaintiffs filed a document entitled "MOTION TO PRODUCE ADDITIONAL

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<sup>5</sup> Plaintiffs failed to include Buckley's anti-SLAPP motion in the Clerk's Transcript filed on appeal. By order dated August 13, 2009, we granted Buckley's request to augment the record to include the anti-SLAPP motion and other related documents.

EVIDENCE ON APPEAL." The new evidence that Plaintiffs ask this court to consider appears to be portions of a transcript of the deposition of Michael London, identified as "general manager of Pure Fitness." Plaintiffs contend that some of London's statements contradict Buckley's claims in the trial court that Buckley had nothing to do with the sale of membership lists to Pure Fitness. Buckley filed an opposition to the motion for leave to produce additional evidence, contending that Plaintiffs failed to show good cause for their failure to present the evidence in the trial court. After considering the parties' contentions, we decline to exercise our discretion under section 909 to take additional evidence on appeal, and therefore deny Plaintiffs' motion for leave to introduce new evidence on appeal.

### III

#### DISCUSSION

##### A. *Relevant law*

Section 425.16, the anti-SLAPP statute, provides in pertinent part: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any

other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (*Id.*, subd. (e).)

Resolution of a special motion to strike "requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. [Citation.] If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon*).) In other words, "the moving defendant's burden is to show the challenged cause of action 'arises' from protected activity. [Citations.] Once [but only if] it is demonstrated the cause of action *arises* from the exercise of the defendant's free expression or petition rights, then the burden shifts to the plaintiff to show a probability of prevailing in the litigation." (*Shekhter v. Financial Indemnity Co.* (2001) 89 Cal.App.4th 141, 151.)

"Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' " (*Equilon, supra*, 29 Cal.4th at p. 67.) For purposes of an anti-SLAPP motion, "[t]he court considers the pleadings and evidence submitted by both sides, but does not weigh credibility or compare the weight of the evidence. Rather, the court's responsibility is to accept as true the evidence favorable to the plaintiff . . . ." (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212 (*HMS Capital*), citation omitted.)

B. *Analysis*

Buckley contends that Plaintiffs' causes of action against him arise from his petitioning activities in the unlawful detainer litigation. In particular, Buckley asserts that all of Plaintiffs' causes of action against him "are specifically based on Buckley's:

1) statements in pleadings and open court in the unlawful detainer action; 2) statements in relation to the litigation; and 3) conduct in seeking court assistance to transfer Madhouse assets in compliance with the Amended Operating Agreement governing the LLC."

According to Buckley, "The causes of action based on these allegations fall directly in the ambit of the protections provided by the Anti-SLAPP statute."

" 'It is beyond dispute the filing of a complaint is an exercise of the constitutional right of petition and falls under section 425.16.' [Citation.]" (*Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 Cal.App.4th 1532, 1537 (*Kolar*).) "The anti-SLAPP protection for petitioning activities applies not only to the filing of lawsuits, but extends to conduct that relates to such litigation, including statements made in connection with or



in preparation of litigation." [Citation.] Indeed, courts have adopted 'a fairly expansive view of what constitutes litigation-related activities within the scope of section 425.16.' [Citation.]" (*Ibid.*)

"Although a party's litigation-related activities constitute 'act[s] in furtherance of a person's right of petition or free speech,' it does not follow that any claims associated with those activities are subject to the anti-SLAPP statute." (*Kolar, supra*, 145 Cal.App.4th at p. 1537.) "To qualify for anti-SLAPP protection, the moving party must demonstrate the claim 'arises from' those activities. A claim 'arises from' an act when the act ' " 'forms the basis for the plaintiff's cause of action' . . . . " ' [Citation.]" (*Ibid.*, quoting *Equilon, supra*, 29 Cal.4th at p. 66.) " '[T]he "arising from" requirement is not always easily met.' [Citation.] A cause of action may be 'triggered by' or associated with a protected act, but it does not necessarily mean the cause of action arises from that act. [Citation.] As our Supreme Court noted: 'California courts rightly have rejected the notion "that a lawsuit is adequately shown to be one 'arising from' an act in furtherance of the rights of petition or free speech as long as suit was brought after the defendant engaged in such an act, whether or not the purported basis for the suit is that act itself." [Citation.]' [Citation.]" (*Kolar*, at pp. 1537-1538.) Thus, "the mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute. [Citation.]" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

The causes of action that Buckley challenges are identified in the complaint as claims for "[c]onflict of [i]nterest," "[l]egal [m]alpractice," and "[a]iding and abetting a

breach of fiduciary duty." Buckley asserts that "[a]t the trial level, Plaintiffs did not identify one act by Buckley other than his representation of Madhouse in the defense of the Unlawful Detainer Action." However, a review of the allegations of the complaint reveals that none of these claims even refers to, much less is based on, Buckley's conduct in defending Madhouse in the unlawful detainer action. Rather, Plaintiffs allege that Buckley is liable for conduct apart from his actions in the unlawful detainer litigation—i.e., Buckley's alleged representation of Saia in her sale of customer lists and goodwill to Pure Fitness.

Plaintiffs allege that "Saia began selling the customer list and customer goodwill to a competing gym, Pure Fitness ('Pure')." Plaintiffs further allege that Buckley, who had been representing Madhouse, "changed allegiance and represented Saia personally in the transaction with Pure [Fitness] and failed to represent or protect the interests of either the company or the Plaintiffs." Buckley's alleged conduct in representing Saia in her transaction with Pure Fitness clearly does not arise from, nor is it related to, the unlawful detainer action between Madhouse and its landlord.

In granting Buckley's anti-SLAPP motion, the trial court asserted that the following allegations demonstrate that Plaintiffs' claims against Buckley arise from his conduct in litigating the unlawful detainer action:

" 'Defendant Buckley was retained as the Company attorney. On or before July, 2008, Buckley represented Saia without disclosure to or consent from the Plaintiffs, the minority members, in violation of the Rules of Professional Conduct. [¶] As a result, Plaintiffs have been damaged.' "

This statement makes no reference to Buckley's conduct with respect to the unlawful detainer action. On the contrary, the allegation that "Buckley represented Saia without disclosure to or consent from the Plaintiffs" indicates that Plaintiffs are complaining that Buckley undertook to represent Saia personally, while already representing Madhouse, and that he did so in a manner inconsistent with Buckley's professional duties to Plaintiffs.

The unlawful detainer action was against Madhouse, not Saia. The quoted paragraph from the complaint in the trial court's ruling thus suggests the opposite of what the trial court concluded—i.e., it demonstrates that Plaintiffs' causes of action arise from conduct on Buckley's part that is separate from his representation of Madhouse in the unlawful detainer action. In light of all of the allegations of the complaint, it is clear that Plaintiffs are suing Buckley not for what he did or failed to do in the unlawful detainer action, but, rather, for his alleged conduct in helping Saia make an outside deal with Pure Fitness involving the Bodyworks customer lists.<sup>6</sup>

In addition, Buckley submitted a declaration in support of his anti-SLAPP motion, presumably to support his position that the challenged causes of action arise from protected activity. However, there is nothing in Buckley's declaration that suggests that Plaintiffs' claims in this lawsuit arise from the unlawful detainer litigation. The majority of Buckley's declaration describes his participation in the unlawful detainer action;

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<sup>6</sup> We do not intend to make any comment on the merits of Plaintiffs' case against Buckley, or to suggest that the pleadings are immune from other challenges. Our only concern here is whether the trial court properly struck Plaintiffs' causes of action against Buckley under the anti-SLAPP statute.

nothing in the declaration explains how the allegations in the complaint at issue *in this case* arise from Buckley's conduct in defending the unlawful detainer action. Further, although Buckley asserts in his declaration that neither he nor his firm "have ever been retained by Ms. Saia in connection with any negotiations or sales to Pure Fitness," this statement does not demonstrate that Plaintiffs' causes of action arise from the unlawful detainer action. At most, this statement challenges the merits of Plaintiffs' claims. In fact, Buckley essentially admits that Plaintiffs are alleging that he assisted Saia in transferring the customer lists to Pure Fitness when he states, "Plaintiffs[] appear to contend that I represented Ms. Saia in negotiations to transfer customer lists to a health club called Pure Fitness." Again, this is conduct that is separate from Buckley's representation of Madhouse in the unlawful detainer action.

The complaint establishes that Plaintiffs' causes of action do not arise from Buckley's participation in the unlawful detainer action. The trial court thus erred in granting Buckley's motion to strike the claims against him under the anti-SLAPP statute.

IV

DISPOSITION

The order of the trial court is reversed, and the case is remanded to the trial court with directions to deny Buckley's motion. Costs are awarded to Appellants.

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AARON, J.

WE CONCUR:

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McDONALD, Acting P. J.

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McINTYRE, J.